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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR SALDANA,

Defendant and Appellant.

B283946

(Los Angeles County  
Super. Ct. No. YA092327)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed in part, reversed in part and remanded.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Victor Saldana of the first degree murder of Akeem Leggins, second degree robbery, and the unlawful driving or taking of a vehicle. As to the robbery count, the jury found true the special allegation the offense was committed to benefit a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C)).<sup>1</sup> The jury also found true multiple firearm-use enhancements. Saldana contends on appeal the admission of the pathologist's hearsay testimony concerning an autopsy report prepared by a nontestifying pathologist violated his Sixth Amendment right to confrontation as set forth in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). Saldana also contends the trial court erred in imposing the 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C). Saldana further contends remand is necessary to allow the trial court to exercise its discretion whether to impose the firearm enhancements imposed pursuant to section 12022.53, subdivisions (b) and (d).

We conclude the admission of the expert's statements was harmless error and affirm the judgment. However, we reverse the true finding on the section 186.22, subdivision (b)(1)(C), gang enhancement allegation and strike the 10-year prison sentence imposed under this section on count one. On remand the trial court should exercise its discretion whether to impose the firearm enhancements.

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<sup>1</sup> All undesignated statutory references are to the Penal code.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Information*

The information charged Saldana with first degree murder (§ 187, subd. (a); count 1), second degree robbery (§ 211; count 2), and the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 3).<sup>2</sup> The information alleged six special allegations as to count 1: Saldana personally used a firearm (§ 12022.53, subd. (b)); Saldana personally and intentionally discharged a firearm (§ 12022.53, subd. (c)); in the commission of the offense Saldana personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)); a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)); a principal personally and intentionally discharged a firearm (§ 12022.53, subds. (c), (e)(1)); and a principal personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)).<sup>3</sup> The information alleged as to count 2 that Saldana committed the offense for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subds. (b)(1)(C)) and that a principal

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<sup>2</sup> The information also charged codefendant Jose Jara in counts 1, 2, and 3. Jara entered a negotiated plea prior to trial, and Saldana was tried as the sole defendant.

<sup>3</sup> The jury was instructed as to count 1 only on the firearm enhancement allegation under section 12022.53, subdivisions (d) and (e)(1). The verdict forms likewise reflect only this firearm enhancement allegation. The record does not reflect dismissal of the other firearm enhancement allegations, although we assume the trial court dismissed these allegations prior to the trial court instructing the jury.

personally used a firearm, a handgun (§ 12022.53, subds. (b), (e)(1)).

Saldana pleaded not guilty and denied the special allegations.

B. *Opening Statements*

During her opening statement, the prosecutor told the jury Saldana murdered Leggins in a premeditated act of gang violence because Saldana believed Leggins was a rival gang member. The prosecutor stated further the evidence would show Saldana stole a truck and used it in the charged robbery, then later used it in connection with the murder of Leggins.

Saldana's counsel conceded in his opening statement that Saldana shot Leggins, but stated Saldana was merely acting in self-defense after the two had engaged in a gang-related argument. He stated further the evidence would show Leggins was shot in the back, but it would have only taken "a fraction of a second" for Saldana to shoot Leggins in self-defense based on the positioning of Leggins's body.

C. *The Prosecution Case*

1. *The theft of Gilberto Soltero's truck*

On February 17, 2014 Gilberto Soltero parked his silver Ford F-150 pickup truck at his home in Inglewood. The following morning he noticed his truck was missing, and he contacted law enforcement to file a report concerning his stolen truck.

## 2. *The robbery of Christian Rios*

On February 18, 2014 Christian Rios was walking in an alley in Inglewood carrying a backpack, a cell phone, and headphones. Rios saw a grey or black pickup truck pull up with the driver's side window down. He saw a Hispanic male in the driver's seat who was 25 to 30 years old. Rios saw a second man wearing a hoodie standing in front of the truck. He was approximately five feet seven inches tall and "[s]kinny." The man with the hoodie appeared to be robbing a third man. He was holding the third man by the shirt and hitting him with something small and gray in his hand.

Rios walked away, but soon was followed by a truck with the two men inside. The truck stopped near Rios, and the man with a hoodie exited. He said he was "Bones" from "Inglewood Trece." The driver said he was "Little Magic." Bones pointed a grey revolver at Rios's head, while the driver remained in the driver's seat. Bones demanded Rios empty his pockets. Rios complied, removing his cell phone and headphones. Bones removed Rios's backpack and demanded Rios place the backpack and items from his pocket on the passenger's seat of the truck. Rios again complied. Bones instructed Rios not to say anything to the police, or else they would "get" Rios.

## 3. *The shooting of Leggins*

Theron Domino testified to the events on the afternoon of February 18, 2014. Domino had asked his friend Leggins to meet him by the bus stop on Venice Way and Beach Avenue in the City of Inglewood. Domino arrived at the bus stop by scooter and Leggins arrived on a bicycle. Domino had not seen Leggins with

a weapon that day, and did not know whether Leggins was armed.

Domino and Leggins spoke, and as they were preparing to leave, Domino noticed a silver Ford or Dodge pickup truck stop at an adjacent stop sign, drive partway into the intersection, then abruptly drive in reverse towards them. A Hispanic man who was approximately five feet 10 or 11 inches tall and in his early 20's exited the truck and said something Domino believed was gang-related. The man reached for his waistband, and Domino observed him holding a silver object that appeared to be a revolver. Leggins said, "Oh shit," and Domino turned and ran away from the truck. As he ran, he heard four or five gunshots.

Domino called 911 and reported "some Mexicans" got out of a "silver pickup truck," shot Leggins, and "peeled out." Domino reported there were two Hispanic men, approximately 20-25 years old or younger, and the one who "pulled the trigger" had a Mohawk.

That afternoon Donnell Willcot was driving on Beach Avenue when he heard gunshots and saw a truck speed past him. Both occupants of the truck were Hispanic men; the passenger had a Mohawk-style haircut. When Willcot reached the stop sign at Beach Way, he noticed Leggins slumped over a bicycle.

Latia Martin was approaching the stop sign on Beach Avenue and Venice Way the same afternoon, when she saw a silver truck in the intersection slam on its breaks and drive in reverse quickly towards the bus stop. The driver and passenger were Hispanic men. She also saw four 18- or 19-year old men standing in the area by the intersection, including one on a bicycle. As the truck reversed, some of the men ran. The passenger of the truck jumped out and walked toward the young

men. About a second later, he pointed a gun and started shooting. Martin heard the shooter fire four gunshots. The shooter ran back into the truck, and the truck drove away. Martin left, then came back around and saw Leggins lying on top of the bicycle.

Paramedics arrived on the scene and transported Leggins to the hospital, where he was later pronounced dead. Inglewood Police Department Detective Gabriel de la Torre was assigned to investigate Leggins's death and arrived at the scene the same day. While he was at the scene, he was informed that an individual, whom he later learned was Soltero, was attempting to report a stolen vehicle that matched the description of the vehicle involved in the shooting. Detective de la Torre returned to the station and interviewed Soltero concerning the theft of his truck.

Inglewood Police senior forensic specialist Ron Paul arrived on the scene that evening after Leggins had been transported to the hospital. Paul recovered the bicycle, the scooter, and other items from the scene as evidence. He did not see any weapons or spent cartridges.

#### *4. Recovery of Soltero's truck*

On February 20, 2014 Los Angeles County Sheriff's Deputy Lashunda Dennis was driving by Soltero's truck near Inglewood when her patrol vehicle alerted her the truck had been reported stolen. She arranged for the truck to be transported to a tow yard. Detective de la Torre was notified Soltero's truck had been recovered, and he requested Paul conduct a forensic examination.

On February 24 Paul arrived at the tow yard to process Soltero's truck. He photographed the truck and swabbed the interior, including the stereo, for DNA evidence. He observed a

backpack in the rear seat. At trial, Soltero identified his truck from the photograph of the interior, but did not recognize the backpack that was inside.

5. *Forensic evidence*

Los Angeles County Sheriff's Department senior criminologist Amanda Davis analyzed four bullets that had been recovered from Leggins's body during an autopsy. She opined the bullets were .22-caliber, and could have been fired from a .22-caliber long rifle revolver.

Los Angeles County Sheriff's Department senior criminologist George Hou testified about the DNA samples Paul had collected. The DNA collected from the stereo showed Soltero as the major contributor and Saldana as a possible minor contributor. The DNA profile showed a match rate for Saldana of 1 out of 209 million, meaning out of a population of 209 million unrelated individuals, there would be one individual whose DNA would be a match.

6. *The recorded conversation between Saldana and the informant*

In December 2014 Saldana was in custody for an unrelated offense. Detective de la Torre directed a civilian informant to conduct an undercover operation in which the informant shared a jail cell with Saldana. A listening device was placed in the room, and Detective de la Torre recorded the conversation between Saldana and the informant. After the informant built a rapport with Saldana, Detective de la Torre entered the jail cell. As part of a ruse to get Saldana to talk to the informant, Detective de la Torre told Saldana that he was collecting Saldana's DNA sample



in connection with the murder of a “Napp” near Beach Avenue and Venice Way. After Detective de la Torre left the cell, Saldana and the informant began speaking about the incident.

Saldana described using a .22-caliber revolver, disposing of the firearm, wiping down the car used in the shooting, and confirming no shell casings were left at the scene of the shooting. Saldana admitted he had a crime partner in the shooting, but he did not believe his partner would cooperate with law enforcement. Saldana admitted telling Leggins “fuck napps” before shooting him. Saldana boasted that Leggins was “on the bike and he’s barely trying to turn around.” When the informant stated to Saldana, “if you got to do time” then “it’s better to do time for something you did than something you didn’t do,” Saldana replied, “Exactly.”

Saldana told the informant another person was with Leggins at the time of the shooting, but that person ran away when he saw Saldana exit the truck. The other person’s back was turned when Saldana shot Leggins. Saldana remained convinced the witness would not be able to identify Saldana because Saldana was wearing a Mohawk-style haircut and his tattoo was covered with a long-sleeved shirt. Saldana used this disguise “because [he] knew [he] was going to” shoot Leggins. The following day, he shaved off his Mohawk.

Detective de la Torre interrupted the conversation and interrogated Saldana separately. He showed Saldana a photographic lineup that included Saldana. Detective de la Torre had circled Saldana’s photograph and placed initials next to it to suggest a witness had identified Saldana. De la Torre also showed Saldana a photograph of Jara and the stolen truck, and indicated both had been implicated in the shooting.

Saldana then returned to the jail cell and told the informant the detective had shown him a photograph of his “crimey” and the truck used in the shooting. Saldana admitted he was “guilty” of the crime and there was “not much [he] c[ould] do” but “take a deal.” When the informant suggested Saldana should “try to get [a] deal,” Saldana replied he would accept a plea deal for “[t]en years” or “even 20 years.”

#### 7. *Gang Expert Testimony*

Inglewood Police Detective Jose Barragan testified as a gang expert. He testified that violence elevates a gang member’s status and it is common for gang members to shout out the name of their gang when committing violent acts against rival gang members. Inglewood Trece is a gang in the Inglewood area comprised of 250 to 300 members, and is predominately Hispanic. Among Inglewood Trece’s rivals are the Neighborhood Pirus, a predominantly African-American gang. Inglewood Trece members use the term “Napps” to refer disparagingly to members of the Neighborhood Pirus gang. Rival gangs disparagingly refer to members of Inglewood Trece as “Pecks.” The intersection of Beach Avenue and Venice Way, where Leggins was shot, is an area claimed by the Neighborhood Pirus gang, approximately one mile away from Inglewood Trece territory.

Detective Barragan had field contacts with Saldana between 2012 and 2014, during which Saldana admitted he was a member of Inglewood Trece with the moniker “Little Magic.” Saldana had various tattoos related to Inglewood Trece. Between 2012 and 2014 Saldana’s hair was in a buzz cut or shaved.

When presented with a hypothetical based on the robbery of Rios and the shooting of Leggins, Barragan testified the crimes

were committed in association with and for the benefit of the gang. He explained the crimes were in association with the gang because they were committed by two gang members. In addition, claiming membership in the gang, claiming monikers, pointing firearms at people, and shooting and killing someone benefit the gang because the actions cause fear in the neighborhood and show the gang members' dedication to the gang.

A second gang expert, Inglewood Police Detective Daniel Milchovich testified he had prior field contact with Saldana, who identified himself as Little Magic from the Inglewood Trece gang. Detective Milchovich also described Saldana's gang-related tattoos.

#### 8. *The Autopsy*

Dr. James Ribe, a forensic pathologist, testified as an expert about the results of Leggins's autopsy. However, it was Dr. Ribe's colleague, Dr. Chinwah, who performed the autopsy and prepared the autopsy report. Dr. Ribe and Dr. Chinwah were both deputy medical examiners in the coroner's office. According to Dr. Ribe, Dr. Chinwah performed the autopsy on February 23, 2014.

Leggins had four gunshot wounds to his back. When asked about the findings concerning the first bullet, Dr. Ribe refreshed his recollection by referring to Dr. Chinwah's autopsy report. After reviewing Dr. Chinwah's report, Dr. Ribe proceeded to testify about the details of all four bullet wounds and trajectories.<sup>4</sup> During his testimony Dr. Ribe also relied on a color

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<sup>4</sup> Although Dr. Ribe referred to Dr. Chinwah's report in testifying about the first bullet, it is not clear from the record

photograph of the back of Leggins's body that showed the bullet holes. One bullet entered Leggins's left upper back, went through the chest from left to right, back to front, then into the upper neck, where it was recovered. A second bullet entered Leggins's middle back and traveled to the lower neck. A third bullet entered Leggins's left lower back and traveled upward into his right upper chest. The fourth bullet entered Leggins's lower back, traveled upward, and was recovered from his upper chest. Dr. Ribe testified there were no bullet wound entries into the front of Leggins's body and that, in his expert opinion, all four gunshot wounds were fatal. The cause of death was multiple gunshot wounds.

D. *The Defense Case*

Saldana testified he was walking in Inglewood on February 18, 2014 when he entered an unlocked truck, found a key to the truck in the glove compartment, and drove away. Saldana was alone, not with Jara. Saldana admitted he was carrying a .22-caliber revolver for protection because he is a gang member.

When he reached the intersection of Beach Avenue and Venice Way, Saldana observed two to four African-American men at the bus stop. He noticed one of the men held his fingers in a V formation. Saldana thought the man was one of his friends asking for a ride, so he braked, and drove in reverse to pull in front of the bus stop. Saldana left the truck running and exited from the passenger side door. At this point he saw Domino and Leggins, and realized he did not know the man he thought was

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whether he was looking at the report when he testified about the other three bullet wounds and trajectories.

flagging him down. Leggins, who was on a bicycle, told him, “Fuck Mexicans.” Leggins added, “Fuck Pecks.” Saldana interpreted this as disrespecting his neighborhood, and responded, “Fuck you . . . [y]ou fuckin’ Napp.” According to Saldana, Leggins then told him, “Don’t trip. I got something for you,” and turned to his right and motioned as though he were reaching for a pistol. Saldana demonstrated for the jury what Leggins did by turning to his right and moving his left hand into the area of his right hip waistband.

Saldana believed his life “was in immediate danger,” and it “was either [Saldana’s] life or [Leggins’s] life.” He believed Leggins was a member of a gang given the area. He also thought Leggins was armed because he said, “I got something for you,” and then reached for his waistband. Saldana believed Leggins was going to shoot him, so he reached for his .22-caliber revolver from his waistband, and pulled the trigger four times. He jumped back in the truck and drove away. Saldana did not see what happened to Leggins.

Shortly after the shooting, Saldana wiped down the steering wheel, stereo, and dashboard of the truck before abandoning it. Saldana later disposed of the gun by giving it to another individual. He never saw the gun again.

Saldana testified he lied and exaggerated when he spoke with the informant in the jail cell to earn his respect because he believed the informant was a gang member and could enhance Saldana’s status and reputation in the jail. Saldana believed if he impressed the informant, the informant would tell other inmates about Saldana’s violence and Saldana would earn the respect of those inmates. Saldana was under the influence of

crystal methamphetamine on the day he spoke with the informant.

Saldana told the informant he would take a plea deal offering 10 or 15 years because, even though he acted in self-defense, he knew there was always a chance he would be convicted of first degree murder. Saldana styled his hair in a Mohawk to try a different hairstyle, not in anticipation of shooting someone. He told the informant he styled his hair in a Mohawk specifically for the murder to make his story more believable. Saldana denied involvement in the robbery of Rios.

E. *Jury Instructions, Verdicts, and Sentencing*

The trial court instructed the jury on count 1 with, inter alia, CALCRIM No. 520 (first or second degree murder); CALCRIM No. 521 (first degree murder); CALCRIM No. 505 (self-defense); and CALCRIM No. 571 (voluntary manslaughter based on imperfect self-defense). The trial court also instructed the jury with CALCRIM No. 1600 for the robbery of Rios and CALCRIM No. 1820 for the unlawful taking or driving of Soltero's vehicle.

The jury found Saldana guilty on all three counts. The jury found true as to count 1 the allegations Saldana personally and intentionally discharged a firearm, causing great bodily injury or death (of Leggins), and he committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members. The jury found true as to count 2 the allegations a principal personally and intentionally used a firearm, and that a principal committed the offense for the benefit of, at the direction of, and in association with a criminal

street gang with the specific intent to promote, further, and assist in criminal conduct by gang members.

The trial court sentenced Saldana on the murder count to an indeterminate term of 25 years to life, plus 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1), for a total sentence of 50 years to life. The trial court also sentenced Saldana on count 1 to 10 years for the gang enhancement pursuant to section 186.22, subdivision (b)(1), but ordered it stayed. The trial court selected count 2 as the base determinate term and imposed the middle term of three years, plus 10 years for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(C), and 10 years for the allegation he personally discharged a firearm, pursuant to section 12022.53, subdivisions (b) and (e)(1). The trial court sentenced Saldana to the middle term of two years for count 3, to run concurrent with the sentence on count 2. The trial court sentenced Saldana to an aggregate term of 23 years and 50 years to life.

Saldana timely appealed.

## DISCUSSION

### A. *Standard of Review*

Saldana’s claim for violation of his right to confrontation involves mixed questions of law and fact. “We review de novo a claim under the confrontation clause that involves mixed questions of law and fact. [Citation.] Under this standard, we defer to the trial court’s determination of “the historical facts”—which “will rarely be in dispute”—but not the court’s “application of [the] objective, constitutionally based legal test to [those]

historical facts.”” ( *People v. Arredondo* (2017) 13 Cal.App.5th 950, 968; accord, *People v. Hopson* (2017) 3 Cal.5th 424, 431 [confrontation clause claim reviewed de novo].) “We apply the substantial evidence standard to the trial court’s factual findings—whether those findings are express or may be inferred from the record.” ( *People v. Arredondo*, at p. 968; accord, *People v. Cromer* (2001) 24 Cal.4th 889, 902.)

B. *Application of the Confrontation Clause to Statements Made in Autopsy Reports*

In *Crawford*, the United States Supreme Court held that the admission of testimonial statements by a nontestifying witness without a prior opportunity for cross-examination violates the defendant’s right to confrontation under the Sixth Amendment. ( *Crawford*, *supra*, 541 U.S. at p. 68.) This right to confrontation “bars the admission at trial of a testimonial out-of-court statement against a criminal defendant unless the maker of the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination.” ( *People v. Lopez* (2012) 55 Cal.4th 569, 580-581; accord, *Crawford*, at p. 68.)

Although the court in *Crawford* declined to provide a comprehensive definition of what is “testimonial,” it made clear a testimonial statement has two critical components: the statement must be made with some degree of formality or solemnity, and its primary purpose must be related to a criminal prosecution. ( *People v. Sanchez* (2016) 63 Cal.4th 665, 680 ( *Sanchez*); *People v. Leon* (2015) 61 Cal.4th 569, 603 ( *Leon*).)

The United States Supreme Court applied its holding in *Crawford* to the admission of laboratory reports prepared by analysts who did not testify in *Melendez-Diaz v. Massachusetts*



(2009) 557 U.S. 305, 311 and *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 651 (*Bullcoming*). In *Melendez-Diaz*, the prosecution in a drug trafficking trial introduced into evidence sworn statements in a laboratory report that the substance found in the defendant's car was cocaine. (*Melendez-Diaz*, at p. 311.) The court held the sworn statements fell "within the 'core class of testimonial statements'" because they were solemn declarations made for the purpose of proving some fact relevant to criminal proceedings and "functionally identical to live, in-court testimony." (*Id.* at pp. 310-311).

In *Bullcoming*, the prosecution in a trial for driving while intoxicated introduced into evidence a laboratory report containing testing results from the defendant's blood sample through the in-court testimony of an analyst who had not prepared the report. (*Bullcoming, supra*, 564 U.S. at p. 651.) The court found the "surrogate testimony" of the analyst was testimonial due to the formality under New Mexico law associated with preparation of the report, in violation of the defendant's rights under the confrontation clause. (*Bullcoming*, at pp. 652, 664-665.)

Following *Crawford*, the California Supreme Court has on multiple occasions addressed the question presented here—whether a pathologist may testify about statements made by a nontestifying pathologist in an autopsy report. In *People v. Dongo* (2012) 55 Cal.4th 608 (*Dongo*), the court considered testimony by a pathologist who relied on the report of a nontestifying pathologist to describe hemorrhages in the victim's eyes and neck organs, the color of her face, the absence of any natural cause of death, the absence of a fractured bone, and that she had bitten her tongue. (*Id.* at p. 619.) The Supreme Court

found the defendant's confrontation rights were not violated, explaining that "statements describing the pathologist's anatomical and physiological observations about the condition of the body" are not testimonial in nature because they "merely record objective facts, [and] are less formal than statements setting forth a pathologist's expert conclusions." (*Ibid.*) The court also likened the reports to observations by a physician in a medical report after examining a patient and determining the appropriate treatment, and thus, "criminal investigation was not the primary purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes." (*Id.* at pp. 619-621.)

Three years later, the California Supreme Court in *Leon* concluded the "admission of autopsy *photographs*, and competent testimony based on such photographs, does not violate the confrontation clause." (*Leon, supra*, 61 Cal.4th at p. 603; accord, *People v. Garton* (2018) 4 Cal.5th 485, 506 (*Garton*) ["The first category of [the pathologist's] testimony, premised explicitly on photographs and X-rays, did not constitute hearsay."].) The court in *Leon* explained the autopsy photographs were not hearsay, observing "[o]nly people can make hearsay statements; machines cannot." (*Leon*, at p. 603.)

The court in *Leon* clarified "that testimony relating the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay." (*Leon, supra*, 61 Cal.4th at p. 603.) Similarly, as the court later held in *Garton*, an expert's own opinions "generally relying on the photographs" did not communicate out-of-court statements because the photographs were not statements. (*Garton, supra*, 4 Cal.5th at p. 506.)

However, the expert's recitation in *Leon* of "the observations *and conclusions*" contained in the autopsy report raised a potential confrontation clause violation. (*Leon, supra*, 61 Cal.4th at p. 604.) Although the court in *Leon* discussed the holding in *Dungo* that there was no confrontation violation where the testifying pathologist expressed forensic opinions based on the nontestifying pathologist's observations in the autopsy report, the *Leon* court distinguished *Dungo* on the basis the report there was not admitted into evidence, but in *Leon* it was. (*Leon*, at pp. 603-604.) The court in *Leon* avoided directly reaching whether the testimony violated the confrontation clause, instead concluding, "[a]ssuming the testimony and report were erroneously admitted," the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*Leon*, at p. 604.)

The California Supreme Court in *Sanchez* next held in the context of testimony of a gang expert that an expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez, supra*, 63 Cal.4th at p. 686.) As the court explained, if the expert testifies to these "out-of-court statements to explain the bases for his opinion," the statements are necessarily considered by the jury for their truth, and are hearsay. (*Id.* at p. 684.) If the hearsay statements are testimonial, their admission additionally violates the confrontation clause unless they fall within an exception. (*Sanchez*, at p. 685.)

However, the court in *Sanchez* concluded, "[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so" without violating either the

hearsay rules or the confrontation clause. (*Sanchez, supra*, 63 Cal.4th at p. 685.) As the court explained, “[t]here is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception.” (*Id.* at p. 686.)

The California Supreme Court in *Garton*, and later in *People v. Perez* (2018) 4 Cal.5th 421, 456 (*Perez*), applied *Sanchez*’s prohibition on hearsay testimony to a pathologist’s testimony about autopsy reports. In *Garton*, the court concluded the testifying pathologist’s recitation of statements from the autopsy report prepared by the nontestifying pathologist was hearsay, including statements describing the condition of the body, the victim’s height and weight, the fact the victim was pregnant, the trajectory of bullet wounds within the body, and the recovery of a large-caliber bullet from the victim’s petrous bone. (*Garton, supra*, 4 Cal.5th at p. 506.) The *Garton* court, without discussing *Dungo*, concluded, “Assuming that the hearsay . . . was testimonial within the meaning of *Crawford*, we find that any confrontation clause error would have been harmless beyond a reasonable doubt,” citing to *Chapman*. (*Garton*, at p. 507.)

The testifying pathologist in *Perez* similarly relied on an autopsy report he had not prepared to provide descriptions of the victim’s wound, including hemorrhaging in her eyes, depth of the knife wounds, and internal injuries. (*Perez, supra*, 4 Cal.5th at p. 456.) The court first concluded the testimony recited case-specific facts for their truth, and thus was hearsay under *Sanchez*. (*Perez*, at p. 456.) The court discussed the holding in *Dungo*, but similar to its prior opinions in *Leon* and *Garton*,

concluded explicitly, “We need not address *Dungo*’s continued viability here because any federal constitutional error arising from the admission of these statements was harmless beyond a reasonable doubt.” (*Perez*, at p. 456.) Specifically, the court found the details as to the depth of the victim’s stab wounds and details of her injuries “were such minor pieces of evidence that they had no effect on the jury’s ultimate determination of [the defendant’s] guilt.” (*Id.* at p. 457.)

C. *Admission of Dr. Ribe’s Testimony Was Not Reversible Error*

Saldana contends Dr. Ribe’s testimony as to the trajectory of the bullets in Leggins’s body violated his right to confrontation because Dr. Ribe was not the pathologist who performed Leggins’s autopsy, and his testimony therefore constituted testimonial hearsay. Saldana contends he was prejudiced because the trajectory of the bullets—which showed that Leggins was shot in the back—was relevant to Saldana’s argument he acted in self-defense. We follow the approach taken in *Leon*, *Garton*, and *Perez*, and conclude Dr. Ribe’s testimony was hearsay, but even if it was testimonial under *Crawford*, its admission was harmless error under the heightened standard in *Chapman*.

1. *The trial court’s ruling*

During the prosecution’s case, Saldana raised an objection under the confrontation clause to Dr. Ribe testifying about the contents of the autopsy report because he was not the same pathologist who prepared the report. The trial court overruled the objection and permitted Dr. Ribe to present his opinions

based on his review of the observations of the pathologist who performed the autopsy as reflected in the autopsy report, as well as the photographs.

2. *Dr. Ribe's testimony concerning the bullet trajectories was hearsay*

Dr. Ribe's testimony fell into three categories: statements describing the autopsy photograph of Leggins's back; statements describing Dr. Chinwah's observations of the bullet trajectories; and Dr. Ribe's conclusions from having reviewed the report and the photograph. Dr. Ribe's testimony describing the photograph did not constitute hearsay, and therefore was not testimonial hearsay within the meaning of *Crawford*. (*Garton, supra*, 4 Cal.5th at p. 506; *Leon, supra*, 61 Cal.4th at p. 603.) Similarly, Dr. Ribe's own conclusions that all four bullet wounds were fatal and that Leggins's cause of death was multiple gunshot wounds did not constitute hearsay, and therefore did not violate Saldana's right to confrontation. (*Sanchez, supra*, 63 Cal.4th at p. 685 ["Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so."]; *Leon, supra*, 61 Cal.4th at p. 603 ["[T]estimony relating the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay."].)

By contrast, Dr. Ribe's recitation of Dr. Chinwah's observations about the trajectory of the bullets and his statement that there were no bullet wound entries into the front of Leggins's body repeated the out-of-court factual statements made by Dr. Chinwah, and were offered for the truth of the statements. The statements were hearsay under *Perez*, *Garton*, and *Sanchez*.

(*Perez, supra*, 4 Cal.5th at p. 456; *Garton, supra*, 4 Cal.5th at p. 506; *Sanchez, supra*, 63 Cal.4th at p. 686.) The People attempt to distinguish the hearsay testimony in *Garton* (and by extension *Perez*) on the basis the pathologists there quoted directly from the autopsy report, whereas Dr. Ribe used the report to refresh his recollection, but did not recite Dr. Chinwah’s observations. This is a distinction without a difference. Under *Sanchez* and its progeny, the expert may present his or her opinions based on hearsay statements, but may not recite the hearsay statements. Although Dr. Ribe could therefore present his conclusion that Leggins was shot in the back, his description of the trajectory of the four bullets generally restated Dr. Chinwah’s observations, even though he did not quote from the report. Indeed, as the *Garton* court noted, the description of the trajectory of the bullets and other case-specific facts were facts “of which [the testifying pathologist] had no personal knowledge.” (*Garton, supra*, 4 Cal.5th at p. 506.) Here too Dr. Ribe’s specific descriptions of the trajectory of each bullet could only have been based on the observations of Dr. Chinwah. Thus, Dr. Ribe’s testimony as to the trajectory of each bullet was hearsay.<sup>5</sup>

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<sup>5</sup> We need not reach whether the statements fall within an exception to the hearsay rule under Evidence Code sections 1280 (public records) or 1271 (business records) because we conclude even if the statements were inadmissible under *Crawford*, their admission was harmless error under the heightened standard for federal constitutional error under *Chapman, supra*, 386 U.S. at page 24.

3. *Admission of Dr. Ribe's statements was harmless beyond a reasonable doubt*

We recognize the shifting landscape as to whether hearsay statements describing a nontestifying pathologist's factual observations reflected in an autopsy report are testimonial. The *Dungo* court concluded the pathologist's testimony was not testimonial because it lacked formality and preparation of the autopsy report did not primarily serve a criminal purpose. (*Dungo, supra*, 55 Cal.4th at pp. 619-620.) However, the California Supreme Court more recently in *Leon*, *Garton*, and *Perez* has not relied on *Dungo*'s analysis, and most recently in *Perez* expressly questioned *Dungo*'s continued viability. (*Perez, supra*, 4 Cal.5th at p. 456.) We follow the approach of the more recent Supreme Court cases and focus our analysis on whether admission of Dr. Ribe's testimony was harmless error.

The photograph of the four bullet wounds in Leggins's back and Dr. Ribe's testimony explaining the photograph were properly admitted and did not violate the confrontation clause. Dr. Ribe's testimony, after reviewing the photograph and report, that Leggins was shot four times in the back, each wound was fatal, and the cause of death was multiple gunshot wounds was similarly permissible because it reflected Dr. Ribe's own opinions. Thus, the jury could properly have heard Dr. Ribe's conclusions without hearing the specific facts on which he relied to reach those conclusions.

In addition, that Leggins was shot in the back was not in dispute. Saldana's counsel told the jury in his opening statement to expect evidence that Saldana shot Leggins in the back, but urged the jury to find it was in self-defense because it would only take "a fraction of a second" for Saldana to shoot Leggins based



on the positioning of Leggins's body. When asked on cross-examination how Leggins ended up with four bullet holes in his back, Saldana did not dispute Leggins was shot in the back, instead responding, "I guess you can say I got lucky."

There was also significant evidence Saldana did not shoot in self-defense. He told the informant he styled his hair in a Mohawk style, which he later shaved, in an effort to thwart eyewitness identification of him as the shooter. He also wore long sleeves to cover tattoos on his arm for the same purpose. Domino and Willcot testified consistent with Saldana's statement that they saw a man with a Mohawk at the scene of the shooting or driving away from the scene. Saldana admitted telling Leggins "fuck Napps" prior to shooting him, and Domino testified he heard a gang-related insult directed at Leggins. Saldana repeatedly claimed he was alone when he shot Leggins, but admitted to the informant that Jara was his crime partner. Likewise, Domino, Willcott, and Martin described two Hispanic men in the truck, casting doubt on Saldana's credibility.

In light of this testimony, we conclude any confrontation error from admission of Dr. Ribe's description of the trajectory of the four bullets was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; *Perez, supra*, 4 Cal.5th at pp. 456-457; *Garton, supra*, 4 Cal.5th at p. 507.)

D. *The Trial Court Erred in Imposing the 10-Year Gang Enhancement Pursuant to Section 186.22, Subdivision (b)(1)(C)*

Saldana contends, the People concede, and we agree the trial court erred in imposing but staying as to the murder count

the 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1)(C).

Section 186.22, subdivision (b)(1)(C), establishes a 10-year enhancement for violent felonies committed for the benefit of a criminal street gang. By contrast, section 186.22, subdivision (b)(5), imposes a minimum parole eligibility of 15 years for convictions punishable by life imprisonment. When the underlying conviction already carries the punishment of an indeterminate life sentence, only section 186.22, subdivision (b)(5), applies. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1011 [“We find instead that the plain language of section 186.22(b)(5) governs and therefore conclude that the Court of Appeal erred in applying the 10-year gang enhancement to defendant’s first degree murder conviction.”]; *People v. Salvador* (2017) 11 Cal.App.5th 584, 594 [“[T]he trial court erred in sentencing defendant to a consecutive 10-year term of imprisonment on each of the life terms to which defendant was sentenced.”].)

Because Saldana’s felony conviction for first degree murder is punishable by life imprisonment, it is therefore subject to the enhancement in section 186.22, subdivision (b)(5), not the enhancement under subdivision (b)(1)(C)). (Pen. Code, § 190, subd. (a).) We reverse the sentence, and remand for the trial court to strike the 10-year enhancement imposed pursuant to section 186.22, subdivision (b)(1)(C).

E. *Remand for Resentencing Is Necessary Pursuant to Section 12022.53, Subdivision (h)*

Saldana contends, the People concede, and we agree remand is appropriate for the trial court to exercise its discretion whether to strike the firearm-use enhancements to Saldana’s

sentence imposed pursuant to section 12022.53, subdivisions (b) (count 2) and (d) (count 1).

In 2017 the Governor signed into law Senate Bill No. 620 (2017-2018 Reg. Sess.), which went into effect on January 1, 2018. Senate Bill No. 620 amended section 12022.53, subdivision (h), to give trial courts discretion to strike firearm-use enhancements under this section in the interest of justice. (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) Section 12022.53, subdivision (h), provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”

The People concede section 12022.53, subdivision (h), as amended, applies retroactively to Saldana, whose sentence was not final at the time the provision came into effect. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424.)

Further, remand is necessary to allow the trial court to exercise the discretion it did not have at the time of sentencing because the trial court did not indicate at the time of sentencing whether it would have stricken the firearm-use enhancements if it had the discretion. “[A] remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*People v. McDaniels, supra*, 22 Cal.App.5th at p. 425; accord, *People v. Billingsley, supra*, 22 Cal.App.5th at p. 1081 [remand is required when “the record

does not ‘clearly indicate’ the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion”].)

### **DISPOSITION**

The judgment of conviction is affirmed. We reverse the sentence, and remand with directions for the trial court to strike the 10-year enhancement imposed pursuant to section 186.22, subdivision (b)(1)(C). On remand the trial court should exercise its discretion whether to impose or strike the firearm-use enhancements imposed pursuant to section 12022.53, subdivisions (b) and (d).

FEUER, J.

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.